MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Christopher R. Marks,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff,

March 25, 2021

Court of Appeals Case No. 20A-CR-2012

Appeal from the DeKalb Superior Court

The Honorable Kevin P. Wallace, Judge

Trial Court Cause No. 17D01-1809-F6-314

Robb, Judge.

Case Summary and Issues

[1] Christopher Marks appeals the trial court's revocation of his probation and order that he serve his previously suspended sentence. He raises multiple issues for our review, which we restate as: (1) whether the trial court violated his right to self-representation; and (2) whether the trial court abused its discretion when it revoked his probation. Concluding that the trial court did not violate Marks' right to self-representation and that the trial court did not abuse its discretion, we affirm.

Facts and Procedural History

[2] In 2018, the State charged Marks with nonsupport of a dependent, a Level 6 felony. Following a jury trial in 2019, Marks was found guilty. Subsequently, the trial court sentenced Marks to two years in the DeKalb County Jail, all suspended to probation. The conditions of Marks' probation included that he work regularly or actively seek employment and that he pay child support as ordered in cause number 17C01-1209-JP-102. *See* Appellant's Appendix, Volume 2 at 7-9. At the time of the jury trial Marks was unemployed and owed $16,420.09 in child support. *Id.* at 25.[1]

[1] This figure comes from the opinion affirming Marks' conviction on direct appeal. *Marks v. State*, No. 19A-CR-2674 at ¶ 8 (Ind. Ct. App. Apr. 14, 2020).

[3] On February 12, 2020, the State filed a petition to revoke or modify probation alleging that Marks violated the rules of his probation by failing to "make any payments towards his child support order in 17C01-1209-JP-102" and by not maintaining employment as required. *Id.* at 10. The State calculated that as of September 25, 2020, Marks owed $27,937.09 in child support. Transcript, Volume II at 8; Exhibits, Volume III at 7. Marks did not pay any child support between his trial and the State's petition to revoke probation. S*ee id.*

[4] At the evidentiary hearing on the petition to revoke, Marks represented himself. However, the trial court also appointed standby counsel. *See* Tr., Vol. II at 4. Marks' girlfriend, Jennifer Stetler, testified that Marks was looking for employment and that she had witnessed Marks interviewing for jobs over the phone and via Skype. Stetler also testified that Marks watched her children during the day while she worked.[2]

[5] Marks called himself to testify; however, the trial court had standby counsel conduct the direct examination, stating:

> [Trial Court]: Okay, [standby counsel] will be asking you questions. I'm . . . not going to allow you to just speak on anything that happens to come to your mind.
>
> [Marks]: Okay.

[2] Stetler and Marks have one child together. That child is not the subject of this case.

Id. at 22.

[6] Marks testified that he actively seeks employment, spending "three to five hours a day on job boards looking for employment." *Id.* at 28. Marks has also applied and interviewed for various jobs.[3] However, Marks testified that he was unemployed at the time of the revocation hearing in part because the State had Marks' driver's license suspended when he stopped paying child support. *See id.* at 23. Marks further testified that due to being "obsessive-compulsive, agoraphobic and a germophobe [he] cannot work in kitchens[,]" and due to arthritis in his back he is prevented from obtaining other types of employment.[4] *Id.* at 27-28.

[7] The trial court found that Marks had violated his probation by "failing to make any payments toward his child support order entered under Cause No. 17C01-1209-JP-102." Appealed Order at 1; *see* Tr., Vol. 2 at 29. The trial court revoked his probation and ordered the balance of the suspended sentence be served in its entirety. Marks now appeals.

Discussion and Decision

[3] Marks testified that he used a job recruiting website for a time but stopped using it because most of the jobs ended up being in Indianapolis and not Fort Wayne. *See* Tr., Vol. II at 25.

[4] Marks is qualified for field technician and light network technician work. He testified that due to the COVID-19 pandemic, these jobs were among the first to go, negatively affecting his employment opportunities. *See* Tr., Vol. II at 24-26.

I. Self-Representation

[8] The respondent in a probation revocation has a statutory right to counsel. *Eaton v. State*, 894 N.E.2d 213, 216 (Ind. Ct. App. 2008), *trans. denied*. Implicit in the right to counsel is the right to self-representation. *Jackson v. State*, 992 N.E.2d 926, 932 (Ind. Ct. App. 2013), *trans. denied*. Marks argues that he has a constitutional right to self-representation guaranteed by the Sixth Amendment to the United States Constitution which was denied when the trial court prohibited him from conducting his own direct examination.[5] We disagree.

[9] While the United States Supreme Court has held that the Due Process Clause applies to probation revocation hearings, *Gagnon v. Scarpelli,* 411 U.S. 778, 781-82 (1973), it is well settled that probationers are not entitled to the full array of constitutional rights afforded defendants at trial, *Cox v. State*, 706 N.E.2d 547, 549 (Ind. 1999). The due process rights applicable in a probation revocation allow for procedures that are more flexible than in a criminal prosecution. *Id.* at 550. Such flexibility allows courts to enforce lawful orders, address an offender's personal circumstances, and protect public safety, sometimes within limited time periods. *Id.*

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[5] Here, Marks made no objection when the trial court required that standby-counsel conduct Marks' direct examination. Generally, a contemporaneous objection is required to preserve an issue for appeal. *See Anderson v. State,* 653 N.E.2d 1048, 1051 (Ind. Ct. App. 1995). However, while Marks may have waived any claim of error on appeal, and fails to argue fundamental error, we prefer to decide cases on the merits when possible. *Montgomery v. State*, 21 N.E.3d 846, 857 (Ind. Ct. App. 2014).

[10] Our supreme court has stated:

> There are certain due process rights, of course, which inure to a probationer at a revocation hearing. These include written notice of the claimed violations, disclosure of the evidence against him, an opportunity to be heard and present evidence, the right to confront and cross-examine adverse witnesses, and a neutral and detached hearing body. Indiana Code § 35-38-2-3[f] also ensures the probationer the right to confrontation, cross-examination, and representation by counsel.

Issac v. State, 605 N.E.2d 144, 148 (Ind. 1992) (citations and footnote omitted). We have subsequently held that although "Indiana Code section 35-38-2-3(f) provides probationers the statutory right to counsel in probation-revocation proceedings, this is not a right guaranteed by the Sixth Amendment[.]" *Gibson v. State*, 154 N.E.3d 823, 825 (Ind. Ct. App. 2020). Therefore, self-representation is similarly not a right guaranteed by the Sixth Amendment in a probation revocation proceeding. However, we must determine whether Marks' statutory right to self-representation under Indiana Code section 35-38-2-3(f) was violated.

[11] During his probation revocation hearing, Marks actively represented himself. He moved for a continuance of the hearing, made evidentiary objections, cross-examined a witness, and conducted direct examination of a witness. *See* Tr., Vol. II at 4-16. However, when Marks called himself as a witness, the trial court required that standby counsel question Marks, stating, "I'm . . . not going to

allow you to just speak on anything that happens to come to your mind."[6] *Id.* at 22. Marks contends that the trial court "could simply have required that Marks ask himself questions rather than testify in narrative fashion." Brief of Appellant at 11.[7] However, Marks also acknowledges that the "trial court did not terminate [his] self-representation; it only prohibited him from conducting his own direct examination[.]" *Id.* at 10.

[12] Moreover, we note that Marks does not claim that he was prejudiced by standby counsel's questioning. We have emphasized the importance of this factor when a probationer claims that they were inadequately advised regarding self-representation in a revocation hearing. *See Hammerlund v. State,* 967 N.E.2d 525, 529 (Ind. Ct. App. 2012). *Hammerlund* deals with the waiver of counsel and thus is not directly analogous with this case; however, the right to self-representation during a probation revocation hearing is similarly at issue. Therefore, we find *Hammerlund* instructive in analyzing the case at hand.

[13] In *Hammerlund,* the probationer did "not contend, much less establish, that he suffered any prejudice. . . . [He] simply claims he was inadequately advised without saying how it harmed him." *Id*. Thus, we concluded that the

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[6] It is established that the trial court's appointment of standby counsel is the recommended procedure to preserve a defendant's rights when he elects to represent himself. *German v. State*, 268 Ind. 67, 73, 373 N.E.2d 880, 883 (1978). A trial judge may terminate self-representation by a defendant who deliberately engages in serious or obstructionist misconduct. *Id.*

[7] Marks also argues that denial of the right of self-representation is "not amenable to harmless error analysis; the right 'is either respected or denied; its deprivation cannot be harmless.'" Br. of Appellant at 8 (citing *Sherwood v. State*, 717 N.E.2d 131, 137 (Ind. 1999). However, *Sherwood* examines the right to self-representation during a trial; therefore, its holdings do not apply to proceedings to revoke probation.

probationer in *Hammerlund* failed to establish that his waiver of counsel was anything other than knowing, intelligent, and voluntary.

[14] Similarly, Marks claims his right to self-representation was violated without saying how he was harmed by standby counsel conducting his direct examination. Marks makes no argument that standby counsel's questioning was ineffective, contradicted his planned defense, or prevented him from presenting any particular information to the trial court. Therefore, we conclude that the trial court did not violate Marks' right to self-representation under Indiana Code section 35-38-2-3(f).

II. Revocation of Probation

A. Standard of Review

[15] Probation is a "matter of grace" left to the discretion of the trial court, not a right to which a criminal defendant is entitled. *Prewitt v. State*, 878 N.E.2d 184, 188 (Ind. 2007). "The trial court determines the conditions of probation and may revoke probation if the conditions are violated." *Id.* The State need only prove the alleged violations by a preponderance of the evidence, and we will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of the witnesses. *Monroe v. State*, 899 N.E.2d 688, 691 (Ind. Ct. App. 2009).

[16] If the court finds that a person has violated a condition of probation at any time before termination of the probationary period, and the petition to revoke is filed within the probationary period, the court may impose one or more sanctions,

including ordering execution of all or part of the sentence that was suspended at the time of initial sentencing. Ind. Code § 35-38-2-3(h). A trial court's decision imposing sanctions for probation violations is reviewable using the abuse of discretion standard. *Sanders v. State*, 825 N.E.2d 952, 956 (Ind. Ct. App. 2005), *trans. denied*. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances, or when the trial court misinterprets the law. *Madden v. State*, 25 N.E.3d 791, 795 (Ind. Ct. App. 2015), *trans. denied.*

B. Violation and Sanction

[17] Marks first argues that there was insufficient evidence to prove that he violated his probation. When the sufficiency of evidence is an issue, we consider only the evidence most favorable to the judgment and will affirm if "there is substantial evidence of probative value to support the trial court's conclusion that a probationer has violated any condition of probation[.]" *Braxton v. State*, 651 N.E.2d 268, 270 (Ind. 1995). The conditions of a defendant's probation are determined at the discretion of the trial court, and if the probationer fails to comply, "a violation has occurred." *Woods v. State*, 892 N.E.2d 637, 641 (Ind. 2008).

[18] The probation department alleged that Marks violated the conditions of his probation that he make payments toward his child support as ordered in Cause Number 17C01-1209-JP-102 and that he work regularly or be actively seeking employment. Kristina Thomas of the DeKalb County child support office

testified at the revocation hearing that Marks had not paid child support since his jury trial. Tr., Vol. II at 8. Further, the State provided an arrearage calculation worksheet showing that Marks had failed to make any support payments. *See* Ex., Vol. III at 7. Marks made no attempt to refute the State's contention that he failed to make any child support payments. Marks' only argument was that he was unemployed and therefore could not make payments. However, the trial court only found that Marks "violated probation by failing to make any payments toward his child support order," Appealed Order at 1, and did not find Marks in violation of probation for failure to secure employment. Therefore, we conclude that there was sufficient evidence that Marks violated his probation.

[19] Marks also argues that the trial court abused its discretion by ordering that he serve the entirety of his previously suspended sentence. Probation revocation is a two-step process. *Woods*, 892 N.E.2d at 640. "First, the court must make a factual determination that a violation of a condition of probation actually occurred." *Id.* If a violation is proven, the trial court then must determine if the violation warrants revocation. *Id.*

[20] When a defendant is found to have violated a condition of their probation the trial court may impose one or more of the following sanctions:

> (1) Continue the person on probation, with or without modifying or enlarging the conditions.

> (2) Extend the person's probationary period for not more than one (1) year beyond the original probationary period.
>
> (3) Order execution of all or part of the sentence that was suspended at the time of initial sentencing.

Ind. Code § 35-38-2-3(h).

[21] Under Indiana Code section 35-38-2-3(g), a trial court may not revoke a defendant's probation "for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay." In *Runyon v. State*, our supreme court held:

> While the State has the burden to prove (a) that a probationer violated a term of probation and (b) that, if the term involved a payment requirement, the failure to pay was reckless, knowing, or intentional, we hold that it is the defendant probationer's burden . . . to show facts related to an inability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment should not be ordered.

939 N.E.2d 613, 617 (Ind. 2010).

[22] Marks contends there is no evidence that since being "placed on probation [he] has had any income or any ability to pay child support." Br. of Appellant at 9. Marks argues that he has repeatedly applied for employment and that "[h]e spends three to five hours a day on job boards looking for employment." *Id.*

Marks also claims that "[t]he suspension of [his] driving privileges" and his mental illness impaired his ability to get a job or pay child support. *Id.*

[23] However, the trial court was not persuaded by Marks' or Stetler's testimony regarding his efforts to obtain employment and determined that the evidence warranted revocation of his probation. The trial court stated that "if [Marks] wanted to work, [he]'d be working somewhere and paying some support." Tr., Vol. II at 29. Marks failed to meet his burden "to show facts related to an ability to pay and indicating sufficient bona fide efforts to pay so as to persuade the trial court that further imprisonment" is unnecessary. *Runyon,* 939 N.E.2d at 616. Marks' argument is simply a request that we reweigh the evidence, which we cannot do.

[24] Further, Marks argues that the trial court abused its discretion in ordering the execution of Marks' suspended sentence because he "is unable to pay child support while incarcerated." Br. of Appellant at 12. Marks argues that the trial court should have continued Marks' probation and modified the conditions of his probation "to include a more specific condition as to the nature of the proof Marks must provide to his probation officer that he is actively seeking employment." *Id.* However, a defendant is not entitled to serve a sentence on probation; rather such placement is a "conditional liberty that is a favor, not a right." *Jones v. State*, 838 N.E.2d 1146, 1148 (Ind. Ct. App. 2005) (citation omitted). Marks' argument is, again, merely a request for this Court to reweigh the evidence and substitute our judgment, which we will not do.

[25] Since his conviction for nonsupport of a dependent, Marks has failed to make a single payment of child support. The trial court made it clear that it believed that Marks' continued failure to pay child support is a conscious choice, stating, "[I]f paying support was a priority for you, you'd pay at least some support . . . but it's not a priority, and no support has been paid." Tr., Vol. II at 29.

[26] The trial court's sanction decision is not against the logic and effect of the facts and circumstances of this case. Therefore, the trial court did not abuse its discretion in ordering Marks to serve the entirety of his previously suspended sentence.

Conclusion

[27] We conclude that the trial court did not violate Marks' right to self-representation and that the trial court did not abuse its discretion in revoking Marks' probation. Accordingly, we affirm.

[28] Affirmed.

Bailey, J., and Tavitas, J., concur.